in that order on the top of the petition but on the body of the petition he is referred to again as "Mohd. Nor bin Ismail". But the most startling fact is to be found in the Gazette Notification PU(B) 340, exhibited by the respondents, in which the only two candidates who stood for the election were shown as Nik Abdul Aziz bin Nik Mat and Mohd. Zain bin Abdullah. The petitioner therefore is ostensibly not a person qualified to present a petition under section 34 of the Election Offences Act.

For reasons aforesaid, I dismiss all the three petitions pursuant to section 36(a) of the Act. I hereby determine that:

(i) Mohamed bin Haji Ali was duly elected to the Kelantan parliamentary constituency of P22 Nilam Puri;

(ii) Annuar bin Haji Musa was duly elected to the Kelantan state constituency of N18 Peringat; and

(iii) Mohd. Zain bin Abdullah was duly elected to the Kelantan parliamentary constituency of P23 Bachok.

A certificate to this effect containing my report negating the commission of any corrupt or illegal practice shall be issued to the election commission.

Order accordingly.

Solicitors: *C. Jegathesan & Co.; Yusof & Apandi.*

YEAP MAH EE v. KUAN KUM CHIEW & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) 1 February 1988]

[Penang – Originating Motion No. 32-10-87]

Civil Procedure – Injunction – Discharge of – Application for – Ex parte application – Whether need to show all the documents – Whether there was serious question to be tried – Whether damages would be an adequate remedy – Where the balance of convenience lies – Merits of application.

The respondent was occupying the ground floor front portion of certain premises of which the applicant was the registered proprietor. Prior to the present tenancy agreement, there were seven other tenancy agreements which gave the respondent the right to occupy the ground floor front portion of the premises.

The applicant forcibly tried to demolish the back portion of the premises which the respondent was also using. The respondent therefore sought an *ex parte* interlocutory injunction to prevent the demolition by the applicant. The injunction was granted by the court. The applicant thereafter made the present application to discharge the injunction granted to the respondent.

Held, dismissing the application: (1) the non-production of the seven previous agreements at the *ex parte* stage did not amount to a suppression of material facts. A party applying for an *ex parte* interlocutory injunctive relief, particularly in cases of real emergency where time is of the essence (and there was *prima facie* evidence that the present case was such a case), is not expected to put forward a fully documented case. Certainly he is not required to inform the court of every fact that might reinforce his own case;

(2) the ground that there was no serious question to be tried had no substance;

(3) damages would not be an adequate remedy;

(4) the balance of convenience favours the respondent rather than the applicant.

Cases referred to:

(1) *Re N (Infants)* [1967] Ch. 512 (cited).
(2) *P.S. Refson & Co. Ltd.* v. *Saggers And Another* [1984] 1 W.L.R. 1025 (cited).
(3) *Lee* v. *Department of Education and Science* (1967) (unreported) *Atkin's Court Forms* Vol. 22 p. 78; see also 24 *Halsbury's Laws of England* 4th Ed. para 1049 (cited).
(4) *WEA Records Ltd.* v. *Visions Channel 4 Ltd. And Others* [1983] 1 W.L.R. 721 (cited).
(5) *Addiscombe Garden Estates Ltd. And Another* v. *Crabbe And Others* [1958] 1 Q.B. 513 (cited).
(6) *Street* v. *Mountford* [1985] A.C. 809 (refd).
(7) *Re a Debtor (No. 75N of 1982, Warrington), ex parte The Debtor* v. *National Westminster Bank plc.* [1983] 3 All E.R. 545 (cited).
(8) *Luganda* v. *Service Hotels Ltd.* [1969] 2 Ch. 209 (cited).
(9) *American Cyanamid* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 510D (apprvd).
(10) *Tan Cheng Wee* v. *Ng Hye Kok* [1966] 1 M.L.J. 209 (cited).
(11) *Brown* v. *Draper* [1944] 1 All E.R. 246 (cited).
(12) *Chan Swee Kin* v. *Tang Wooi Yin* [1983] 1 M.L.J. 261, 263 (cited).
(13) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31 (cited).
(14) *National Provincial Bank* v. *Marshall* (1888) 40 Ch.D. 112 (cited).
(15) *Tan Suan Heoh* v. *Lim Teck Ming & 2 Ors.* [1987] 2 M.L.J. 466 (cited).
(16) *Lee Kwee Foh Ltd.* v. *Yeong Choon Foong* [1969] 1 M.L.J. xxv (cited).

ORIGINATING MOTION.

Ooi Teik Hoe (*Choo Hong Choy* with him) for the plaintiff.

Tan Lean Tee for the defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was an application by Hong Leong Finance Berhad ("HLF"), the registered proprietor of a shophouse subject to the Control of Rent Act 1966 ("the Act") known as 47, Burmah Road, Penang ("the shophouse"), to discharge an *ex parte* interlocutory injunction ("the injunction") which I had granted in favour of the respondent, Yeap Mah Ee, who claimed to be a sub-tenant of the ground floor front portion thereof ("the premises). The injunction restrained HLF whether by themselves, their agents or servants or otherwise from demolishing the back portion of the shophouse pending further order.

Although there is a dispute as to whether the respondent Yeap Mah Ee occupied the premises as a subtenant or as a mere licensee (which it is not open to me to resolve at this stage), I shall, purely for the sake of brevity and convenience, refer to him hereinafter as "the sub-tenant".

The circumstances in which the injunction was granted were these.

On the morning of 21 January 1987, Mr. Ooi Teik Hoe, advocate & solicitor, had appeared before me stating that he wished to make an urgent oral *ex parte* application for the injunction as a matter of extreme urgency so that there was no time to make a formal application supported by an affidavit. He went on to state that his client, the sub-tenant, although a rent-protected sub-tenant, was at that very moment in danger of being forcibly ejected from his home, to wit, the premises, by the agents or servants of HLF.

Mr. Ooi added that the agents or servants aforesaid were, until about half an hour earlier that day, attempting to tear down the back portion of the ground floor of the shophouse wherein were situated both the bathroom and the toilet which the sub-tenant used.

In particular, Mr. Ooi said, and I quote him: "I was at the scene about half an hour ago. I met a representative of HLF, a Mr. Liew, and later, the company's manager, who instructed the workmen to enter the demised premises and to start demolishing the back portion ground floor aforesaid. The manager pushed me aside saying the premises were the company's and challenged me to get a court order adding that his company could pay the damages..." Finally, Mr. Ooi said that his client was present with him then.

I should, I think, now refer to some of the authorities which illustrate the practice and procedure which govern cases of real emergency, when time is of the essence and the potential plaintiff has not had time to issue a writ but nevertheless requires interlocutory injunctive relief.

First of all, what are the documents which ought to be filed in cases of real emergency?

Re N (Infants)[1] shows that the intended plaintiff can produce a draft writ at the *ex parte* hearing together with an affidavit headed "In the matter of an intended action between A and B" which, upon the making of the order, are kept by the court and passed on to the registry of the court at the earliest opportunity, with instructions to treat them as issued and filed as of the time when they passed into official custody.

If the affidavit is yet to be sworn, an order may be made *ex parte* upon the giving of undertakings to swear and file (and if the circumstances are dire, a telegram may suffice, to be verified by affidavit as soon as the writ is issued).

Next, what is the procedure to be adopted in cases of real emergency where interlocutory injunctive relief is sought? Upon this question, the judgment of Nourse J. in *P.S. Refson & Co. Ltd.* v. *Saggers And Another*[2] is especially helpful. In that case his Lordship held that in the event of an application being made *ex parte* for injunctive relief prior to the issue of a writ, the following procedure might be adopted:

(a) The draft of an endorsement on the writ and preferably an engrossed writ ready for issue should, whenever possible, be placed before the court. In cases where there has been a telephonic request for relief the part or parts of the draft endorsement should normally be read over to the judge. Only in cases of very exceptional urgency should the court be asked to act without the sight or hearing of a material part or parts of the draft endorsement.

(b) Although there is no difference in meaning and effect between the obligation to issue a writ "forthwith" or "as soon as practicable", the first of these formula was to be preferred and should normally be adopted. Furthermore, the writ should normally be expressed to be "in the form of the said draft writ of summons" or to claim "relief substantially similar to that hereinafter granted" as the case may be.

(c) It is the duty of the solicitor acting for an intended plaintiff on whose behalf an undertaking is given to the court to issue a writ to see that it is properly and expeditiously implemented and counsel who has been instructed to give such an undertaking may sometimes regard it as his duty to remind his solicitor of this.

The case of *Lee* v. *Department of Education and Science*[3] illustrates the speed and flexibility of the procedure adopted by the courts of the United Kingdom in cases of real emergency. The note there reads:

"... The plaintiff sought a declaration as a matter of extreme urgency on a matter arising on Thursday, 14 September 1967. On Saturday the vacation court (Donaldson J.) tried the action *inter partes*, on a draft writ, without pleadings, and gave final judgment on an undertaking to issue a writ on Monday."

Again, in *WEA Records Ltd.* v. *Visions Channel 4 Ltd. And Others*,[4] Sir John Donaldson M.R., *inter alia*, recorded at p. 724D-F:

"The history of the matter is as follows. The plaintiffs suspected that the defendants were actively engaged in what is popularly known as 'video piracy' – making or selling unauthorized copies of films or video tapes in breach of copyright. They made inquiries, including the keeping of observation on certain premises, and came to the conclusion that it was an appropriate case in which to apply *ex parte* for an Anton Piller order immediately before, or simultaneously with, an application to issue a writ claiming injunctive relief, delivery up of offending material and an inquiry as to damages.

Such was thought to be the urgency of the situation that counsel was asked to appear before Mervyn Davies J. armed only with a draft writ and instructions as to the nature and results of the plaintiffs' inquiries. No affidavit evidence was produced, nor had counsel the advantage of being able to produce unsworn draft affidavits."

In these circumstances, I decided to hear oral evidence *ex parte*, and the sub-tenant was accordingly affirmed. The sub-tenant began by confirming the narrative of events given by Mr. Ooi. He next produced a tenancy agreement dated 25 February 1986 which was duly marked "K". A perusal of the agreement showed that it was entered into by one Kuan Kum Chiew ("the chief tenant") of the one part and the sub-tenant of the other part.

The first recital provided that the chief tenant had agreed to let and the sub-tenant had agreed to take the whole of the front portion of the shophouse upon, *inter alia*, the following terms and conditions:

(a) The premises were to be held by the sub-tenant from year to year at a rental of $50 p.m. and hire charge of $150 p.m. for furniture and fitting until such time as the owners should require the chief tenant to vacate.

(b) There was an overriding proviso that in the event of the owners requiring the land on which the shophouse stood for development the sub-tenant was required to vacate the premises immediately without any compensation payable by the chief tenant.

(c) Both parties were at liberty to give one month's notice in writing of their intention to terminate the tenancy.

The sub-tenant referred to the tenancy agreement "K" and alleged that the solicitor who drafted it did not incorporate what had really been agreed upon by the parties. In particular, he had alleged that although he had initialled against the overriding proviso clause 5(b) (referred to above), he had done so upon the representation made to him by the solicitor that the chief tenant would pay him compensation for yielding vacant possession to the owners and that the clause would be amended accordingly to reflect this. In other words, according to him, he had initialled against clause 5(b) in anticipation of its amendment to provide for payment of compensation.

He added that he intended filing an action for a declaration that clause 5(b) was not binding on him.

In these circumstances, for the reasons given by counsel and upon the oral evidence given, I considered I had a discretion to grant the injunction sought before the issue of the writ, and I accordingly exercised it in favour of the sub-tenant upon the usual undertaking as to damages and upon counsel's undertaking to issue a writ for the declaration concerned against the chief tenant the next day and filing a formal application supported by affidavit for the orders made with liberty to apply to set aside.

On the next day, counsel did fulfil his undertaking to the court by issuing the intended writ, being C.S. 22-6-1987, wherein the sub-tenant as plaintiff claimed as against the chief tenant as the first defendant, and the owner of the shophouse, HLF, as the second defendant, the following reliefs:

(a) a declaration that the agreement in writing dated 28 February 1986 is null and void;

(b) a declaration that the plaintiff is in lawful occupation of the said portion of the said premises No. 47, Burmah Road, Penang;

(c) an injunction to restrain the first defendant whether by herself, her servants or agents or howsoever otherwise from harassing the plaintiff forthwith;

(d) an injunction to restrain the second defendant whether by itself, its servants or agents or howsoever otherwise from harassing the plaintiff forthwith;

(e) an injunction to restrain the second defendant whether by itself its servants or agents or howsoever from demolishing the back portion of premises No. 47, Burmah Road, Penang or any part thereof;

(f) an order that the defendants whether by itself, its servants or agents unlock the iron gate forthwith leading to the toilet and the bathroom situated at the back portion of the said premises No. 47, Burmah Road, Penang;

(g) an injunction to restrain the defendants whether by itself, its servants or agents or howsoever otherwise from obstructing or preventing the plaintiff, his family, his agents or servants or howsoever from gaining access and use of the said toilet and bathroom referred to in paragraph (f) aforesaid;

(h) the sum of $17,477.50 together with interest therein at 8% per annum from the date of judgment till realization;

(i) damages;

(j) costs;

(k) such further costs and or other relief as this honourable court deems fit and expedient.

HLF as the second defendant in C.S. 22-6-1987 had filed a defence dated 16 February 1987, the gist of which was that the sub-tenant was in unlawful occupation of the premises and was therefore not entitled to compensation and that any action by it could not constitute harassment. HLF had also counterclaimed for an order for vacant possession of the premises on the ground that the chief tenant had sublet the premises to the sub-tenant in breach of an oral agreement prohibiting subletting so that the sub-tenant could not claim the protection of the Act.

The solicitors for the sub-tenant had also duly filed the formal application supported by affidavit praying for the injunction which had been granted the previous day.

I must now return to the application for discharge of the injunction by HLF which is now before me. It is based upon four separate grounds, namely:

(a) that there had been suppression of material facts on the part of the sub-tenant when obtaining the injunction. Specifically, it was said that prior to the tenancy agreement dated 25 February 1986 there had been seven previous tenancy agreements in writing entered into by the chief tenant and the sub-tenant, each of one year's duration in respect of the premises, which had expired, none of which, however, had been disclosed by the sub-tenant when applying for the injunction although they were material as they went to show that the sub-tenant was not a tenant but a mere licensee;

(b) that there was no serious question to be tried since the sub-tenant was not in lawful occupation of the premises;

(c) that damages would be an adequate remedy for the sub-tenant; and lastly,

(d) that the balance of convenience favoured HLF rather than the sub-tenant.

The material portions of the affidavit in support of the application to discharge the interlocutory injunction affirmed to by one Lim Chin Hock, the branch manager of HLF, on 6 February 1987 (en. 6) are as follows:

"5. The second respondent (Hong Leong Finance Berhad) has no knowledge that the applicant is or was the sub-tenant of the first respondent (the chief tenant Kuan Kum Chiew) in respect of the front portion of the ground floor of premises No. 47, Burmah Road, Penang and having access at all times to the toilet and bathroom situated on the back portion of the said premises and paying rental of $700 per month to the first respondent.

7. The second respondent requires possession of the premises No. 47, Burmah Road, Penang for development and for such purpose the layout Plan No. 3097 and building Plan No. 23283 has been approved by the relevant authorities.

9. On 8 January 1987, the first respondent (the chief tenant Kuan Kum Chiew) delivered vacant possession of the back portion and the upstairs of premises No. 47, Burmah Road, Penang to the second respondent (Hong Leong Finance Berhad) but, however, the first respondent was unable to deliver the keys and vacant possession of the front portion of the said premises No. 47, Burmah Road, Penang.

10. On the same day, *i.e.* on 8 January 1987, I was present at the said premises No. 47, Burmah Road, Penang with two (2) other employees of the second respondent's company to lock up the door leading to the back portion and the door at the bottom of the staircase leading to the upstairs portion as the applicant never had exclusive possession of the back portion and the upstairs portion in any event and I accordingly made a police report No. 94/87 on 8 January 1987 itself at 11.25 a.m.

12. The second respondent (Hong Leong Finance Berhad) denies paragraph 19 of the applicant's affidavit and denies that the second respondent has attempted to evict the applicant (the sub-tenant Yeap Mah Ee).

13. ... the second respondent (Hong Leong Finance Berhad) denies that they or their servants or agents attempted to demolish the back portion.

14. ... the second respondent (Hong Leong Finance Berhad) denies that on 21 January 1987, the second respondent by their agents or servants were at premises No. 47, Burmah Road, Penang to lock the door leading to the back portion where the bathroom and toilet were located as the said door was locked on 8 January 1987.

15. I further deny that I gave instructions to some people to demolish the back portion but the actual fact was that I was there at premises No. 47, Burmah Road, Penang on 21 January 1987 with two (2) of the workmen to remove the backdoor to the said premises to allow access to the bathroom and toilet as their action was in response to the letter dated 12 January 1987 written by the applicant's solicitors, M/s Ooi & Lee, to the first respondent's solicitors, M/s Lim Kim Chuan & Co., requesting for access.

16. The second respondent (Hong Leong Finance Berhad) further avers that even though the door dividing the back portion from the front portion was locked the applicant still has access to the bathroom and toilet from the back lane.

17. The second respondent (Hong Leong Finance Berhad) is advised and verily believes that the applicant is at best a licensee of the first respondent who has taken the benefit of his stay but, however, motivated by greed for compensation has fabricated all these allegations against the first respondent and also against the lawyer, Mr. Darshan Singh, to obtain compensation from the first and second respondents and which the applicant is not entitled thereto since the sub-tenancy or licence was terminated with the termination of the main tenancy.

19. The second respondent further avers that when the first respondent attorns tenancy to the second respondent on or about March 1979 it was orally agreed that subletting of any portion of the said premises No. 47, Burmah Road, Penang will be prohibited unless with the express consent of the second respondent and therefore the second respondent is advised and verily believe that the applicant cannot now seek the protection of the Control of Rent Act 1966 in view that the sub-tenancy entered between the first respondent and the applicant has now been lawfully terminated."

I shall now consider ground (a) of the application to discharge the injunction which, it will be recalled, alleges that the sub-tenant's non-disclosure of the seven expired tenancy agreements entered into between him as sub-tenant and Kuan Kum Chiew as chief tenant amounted to a suppression of material facts.

It was submitted by counsel for HLF that each of the agreements provided:

(a) that the premises sub-let comprised only the front portion ground floor of the shophouse and so the sub-tenant did not have exclusive possession of the back portion of the ground floor or of the upstairs;

(b) that in the event of HLF requiring the land on which the shophouse stood for development, then the sub-tenant shall vacate the premises immediately without any compensation; and

(c) that there was a prohibition against the sub-tenant subletting the premises.

The above clauses, according to counsel, went to show that the chief tenant did not intend to create a sub-tenancy but only a licence which would expire upon termination of the main tenancy. Accordingly, it was submitted that the failure of the sub-tenant to disclose the seven expired tenancy agreements amounted to a suppression of material facts.

Now, it seems to me patently clear upon the authorities that the whole of the tenancy agreement must be looked at, whatever the labels used, to see if it has conferred and imposed upon the grantee in substance the rights and obligations of a tenant and, on the grantor, the rights and obligations of a landlord and, if so, it must be treated as a tenancy agreement as distinct from a licence: per Jenkins L.J. in *Addiscombe Garden Estates Ltd. And Another* v. *Crabbe And Others*[5] at p. 522.

Applying this approach, I note that the first three of these agreements provide by clause 1 that "the chief tenant hereby lets and the sub-tenant hereby accepts a tenancy of the whole front portion of the premises known as No. 47, Burmah

Road, Penang, inclusive of furniture and fittings therein (hereinafter referred to as "the demised premises") for a period of one (1) year from 1 January 1978 to 31 December 1978 at a monthly sum of dollars fifty only ..." Then, each of these agreements provides by clause 8 that "this tenancy shall under no circumstances be determined by the chief tenant unless the said premises are sold by the landlord".

The subsequent four agreements also provide as aforesaid and, in addition, in each case, by clause 4(a) and (b) provide:

"4. (a) That the sub-tenant paying the rent and performing the agreement by the sub-tenant herein contained may quietly possess and enjoy the premises and the said furniture, fittings and fixtures and effects during the said period of tenancy.

(b) In case of non-payment of rent (whether the same has been first demanded fully or not) or breach of this agreement by the sub-tenant within seven (7) days the chief tenant shall be at liberty to re-enter and take possession of the demised premises without prejudice to any other rights or remedies of the chief tenant and thereupon this letting shall determine *ipso facto* and absolutely."

I am of the opinion that the words of the tenancy agreements, taken as a whole, are apt to give the sub-tenant something in the nature of an interest in the land. There is a term certain in the case of each agreement and there is provision for the payment of rent in consideration of the right to use and enjoy the premises. There is also, on the face of each agreement, the right to exclusive possession. However, I express no concluded opinion on these matters for they will have to be resolved at the final hearing of C.S. 22-6-1987.

In the recent House of Lords case of *Street* v. *Mountford*,[6] Lord Templeman recognized at p. 823 that "exclusive possession (was) not a decisive factor ..." but he made it clear that "(no) other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable" (p. 824). In considering "the nature and quality of the occupancy", he held that the most relevant fact was still "exclusive possession". And, at the same page, he went on to say that "if exclusive possession at a rent for a term does not constitute a tenancy, then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable."

In my opinion, a powerful argument could be mounted at the final hearing of C.S. 22-6-1987 that far from showing that the sub-tenant was a mere licensee of the premises, the seven expired agreements go to confirm his assertion that he was a tenant. It follows, therefore, that the non-production of these seven agreements, at the *ex parte* stage, did not amount to a suppression of material facts. A party applying for *ex parte* interlocutory injunctive relief, particularly in cases of real emergency, where time is of the essence – and there was *prima facie* evidence that the present case was such a case – is not expected to put forward a fully documented case.

Certainly, he is not required to inform the court of every fact that might reinforce his own case. So, for example, in *Re a Debtor (No. 75N of 1982, Warrington), ex parte The Debtor* v. *National Westminster Rank plc.*[7] Warner J. said (at p. 551):

"The rule in *Ex parte Princess de Polignac* exists because, by definition, on an *ex parte* application, the person against whom the order is sought is absent. It is accordingly the duty of the applicant to inform the court of any facts which he knows which might tell in that person's favour. *But the applicant is under no obligation to place before the court every fact that might reinforce his own case.*"

(Emphasis supplied)

I would add a final remark as regards the tenancy agreement dated 28 February 1986 which is the agreement currently in force and, in particular, as regards clause 4(b) thereof which provides that:

"In the event that the landlord requires the land for development on which the said premises stand then the sub-tenant shall vacate the demised premises immediately without any compensation payable by the chief tenant."

and against which in the right hand margin appears the signatures of the parties to agreement. In contrast, none of the earlier agreements, although they contained an identically worded clause, bears their signatures. This may lend some support to the sub-tenant's version that he had at first declined to sign the agreement concerned because it provided for no compensation but later had been tricked into doing so as a result of being told by the chief tenant and the solicitor who prepared it that the offending clause would be amended to provide for the payment of compensation in the event of the landlord requiring the premises for development purposes. The signatures were then affixed against the clause in anticipation of the amendment being made later – so the sub-tenant had alleged.

This, in my opinion, afforded a further reason why production of the seven expired tenancy agreements at the *ex parte* stage might have reinforced rather than hindered the case for the sub-tenant.

I make these observations only in passing and strictly in the context of the submission of counsel for HLF that the non-production of the seven expired agreements constituted a suppression of material facts which vitiated the injunction. I am completely convinced that there is no substance in this submission. It goes without saying that a concluded opinion on the question whether clause 4(b) of the tenancy agreement dated 28 February 1986 is binding on the sub-tenant can only be arrived at the conclusion of the final hearing of C.S. 22-6-1987, wherein he is seeking a declaration on this very question as against the chief tenant and HLF.

I must next consider ground (b) of the application to discharge the injunction which, it will be recalled, alleges that there was no serious question to be tried since the sub-tenant was not in lawful occupation of the premises. In view of my remarks regarding the seven expired agreements when considering ground (a), I do not consider that there is any substance in this ground either.

I must now consider ground (c) of the application to discharge the injunction which, it will be recalled, alleges that damages would be an adequate remedy.

In *Luganda* v. *Service Hotels Ltd.*,[8] it was held that the proper remedy for the occupant of a dwelling ejected contrary to the Rent Act 1977 is a mandatory injunction requiring the ejector to allow him access and occupation; he is not limited to damages, since this would encourage the very mischief which security of tenure under the Rent Act 1977 was designed to prevent.

It is true that in the present case, there was no suggestion that the sub-tenant had been wrongly ejected or locked out from the premises. However, it will be recalled that he did allege that there had been an attempt on the part of agents or servants of HLF to do so, though this was strongly denied.

It is also true that the affidavit evidence, as regards this part of the case, disclosed an acute conflict of evidence.

On the one hand, the sub-tenant had alleged that the agents or servants of HLF had attempted to demolish the back portion of the premises whilst on the other, Lim Chin Hock, their manager, had asserted in his affidavit (en. 6 paragraphs 15 and 16) that he had merely brought two workmen to remove the backdoor to the premises so as to allow the sub-tenant access to the toilet by the backlane. Lim went on to say that his action was in response to a letter dated 12 January 1987 from the solicitors of the sub-tenant (ex. EL 4 to en. 6) to the solicitors for the chief tenant which was in the following terms:

"Dear Sirs,

Re: Penang 3rd Magistrate's Court
Summons No. 85-2539-86

We act for the defendant in the above action.

We understand from our client that your client has on 5th instant vacated the 1st floor of premises No. 47, Burmah Road, Penang and in the course of vacating same had deliberately and without justification locked up the back portion leading to the bathroom and toilet of which our client had been using since occupying the premises aforesaid.

In this respect we are to state that your client is in blatant breach of her covenants.

Meanwhile we are instructed to give you notice which we hereby do that your client is to unlock the back portion to enable our client having access to the toilet and bathroom within seven (7) days from the date hereof, failing which our client will take such action as he may be so advised.

Yours faithfully,
sgd.

c.c. clients."

I am very much aware of Lord Diplock's *dictum in American Cyanamid* v. *Ethicon Ltd.*[9] (at p. 510D) that "it's in no part of the court's function at this stage of the litigation" – that is in considering a motion for an interlocutory injunction, I interpolate – "to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration."

In the circumstances, I must keep an open mind on the question whether there was an attempt by agents or servants of HLF to dispossess the sub-tenant of the premises since this issue cannot be resolved on affidavit evidence.

Be that as it may, it was admitted by Lim, the manager of HLF, that there was at least an attempt to exclude the sub-tenant from the normal means of access to the bathroom and toilet.

The next point I should like to take up, though it was not raised before me, was this: on the sub-tenant's own evidence, he was prepared to vacate the premises if suitable compensation was paid to him. In particular, when seeking the injunction at the *ex parte* stage, he had impugned the agreement (ex. K) on the ground that he had at first declined to sign it since a clause therein specifically provided that no compensation would be paid upon his vacating the premises but having been assured by the chief tenant and the lawyer who prepared the agreement that the offending clause would be amended to provide for the payment of compensation upon such an eventuality, he did sign it. But later, so he said, upon receipt of a notice to quit on 30 July 1986 from the chief tenant his counsel informed him that nowhere in the agreement was there any provision for the payment of compensation and it was then that he realized that he had been tricked into signing the agreement.

Needless to say, the offending clause in this agreement, even assuming it was not tainted with the fraud alleged, was in no way binding upon the sub-tenant, since it is an elementary proposition that any agreement by a tenant of controlled premises to vacate contrary to the provisions of rent control legislation is void and of no effect. The reason for this is that it is contrary to public policy to contract out of the provisions of such legislation unless expressly permitted (see *Tan Cheng Wee* v. *Ng Hye Kok,*[10] *Brown* v. *Draper,*[11] *Chan Swee Kin* v. *Tang Wooi Yin*[12] and *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo*[13]).

There is another aspect to this part of the case (also not raised before me), which I should touch upon. Does the fact that the sub-tenant had agreed to vacate upon the happening of the eventuality concerned, subject to the payment of compensation, show that damages would be a sufficient remedy? I think not. All this shows merely that the sub-tenant had made a demand for the payment of compensation which was not acceded to and, as a result, left the sub-tenant free to insist upon the protection conferred upon him by the Act. I hasten to add that even if the demand had been acceded to, the sub-tenant could, as I have said, have gone back on his word and insisted upon the statutory protection given him under the Act.

I derive analogical support for my conclusion that the mere fact that the sub-tenant had asked for compensation to vacate, which had been declined, does not *ipso facto* mean that damages, as opposed to reinstatement, will be an adequate remedy, from the case of *National Provincial Bank* v. *Marshall.*[14] The proposition for which that case is authority is this: damages are not necessarily adequate even where the contract provides that liquidated damages shall be paid if it is broken.

In the case of *Tan Suan Heoh* v. *Lim Teck Ming and 2 Ors.*[15] which concerned an application for removal of a caveat arising out of a purchaser's action for specific performance of an agreement for sale of land, the purchaser had written a letter to the vendor asking for the payment of damages and the question which I had to consider was whether, for that reason, the letter could be construed as an election to abandon the right to claim specific performance. I concluded it was not for it was only a demand for damages which was not acceded to. I relied, *inter alia*, on *National Provincial Bank* v. *Marshall*[14] and dismissed the application for removal of the caveat. On appeal, the Supreme Court dismissed the appeal.

The present case is, of course, *a fortiori* because, as I have said, a rent-protected tenant can always go back on his agreement to vacate in return for compensation since contracting out of rent control legislation is contrary to public policy.

Be that as it may, the sub-tenant is by statute *prima facie* entitled to security of tenure under the Act and will not be confined to his remedy in damages since this would encourage the very mischief which security of tenure under the Act was meant to confer. To quote the words of Lord Denning in *Luganda's* case:[8]

> "Mr. Luganda is *prima facie* entitled by statute to security of tenure of this room. It was unlawful for the management to lock him out of it: see section 30 of the Act of 1965. They were wrong to take the law into their own hands. *If the management had not changed the lock – and Mr. Luganda was still in occupation – I am sure that the court would have granted an injunction to prevent the management from locking him out.*"
>
> (Emphasis supplied)

Before leaving this ground, mention must be made of a point made by counsel for HLF and it was this: it was said that there is now pending before the Rent Tribunal of the District of Penang

Island Application No. 11 of 1984 issued on 20 January 1984 wherein HLF is seeking an order for vacant possession of the shophouse against the chief tenant under section 18 of the Act and that this serves to confirm that damages would be an adequate remedy for the sub-tenant.

I regret I find this submission unacceptable. Even if HLF is able to satisfy the Rent Tribunal as to the requirements of section 18 of the Act, the latter will still have to consider the question of public interest before exercising the discretion to make the order: see *Lee Kwee Foh Ltd.* v. *Yeong Choon Foong.*[16] In other words, HLF may or may not succeed in obtaining the possession order under section 18 of the Act. I do not therefore consider it right for me to speculate upon the result of those proceedings. Accordingly, I would hold that the pendency of the proceedings before the Rent Tribunal is irrelevant to the present application for discharge of the injunction.

In these circumstances, it is unnecessary for me to consider the question of the balance of convenience for "it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of balance of convenience arises" (per Lord Diplock in *American Cyanamid*[9] at p. 511). But, I think that for the sake of completeness I should deal with this question.

Now, it is common ground that HLF had locked the door separating the back portion from the front portion or had, at least, approved of this measure, thereby preventing the sub-tenant from having any access to the bathroom and had, on its own admission, only as a result of a solicitor's letter, brought workers to remove the back door so as to allow access to the bathroom only via the back lane. Clearly, at the very least, this was an attempt to interfere with the sub-tenant's peaceful and quiet enjoyment of the premises.

And so, when, as in this case, to discharge the injunction might have the effect of depriving the sub-tenant of the peaceful possession and enjoyment of his home, which is subject to the Act, then this is likely to be more serious than the prejudice which would be caused to the owners HLF by reason of the continuance of the injunction. It is my opinion, therefore, that the balance of convenience clearly favours the sub-tenant rather than HLF.

For the avoidance of doubt, I should perhaps add, that in so concluding, I have paid especial regard to the interests of all parties concerned, keeping in mind their foreseeable positions, considerations of hardship, the balance of convenience and all other relevant discretionary factors.

In all the circumstances, the application to discharge the injunction is dismissed with costs.

Application dismissed.

Solicitors: *Ooi, Lee & Co.; Chew Tan & Lim.*

GISSCO SDN. BHD. v. BLACKGOLD (M) SDN. BHD.

[O.C.J. (Tan Chiaw Thong J.) 27 November 1987]

[Miri – Suit No. MR295 of 1986]

Civil Procedure – Summary judgment – Whether supporting affidavit a sufficient compliance with Order 14 rule 2(1) – Whether defence bona fide – Leave to defend.

The plaintiff applied for summary judgment under Order 14 of the Rules of the High Court 1980. The plaintiff submitted a statement of claim together with a supporting affidavit which purported to be a compliance with Order 14 rule 2(1). The defendant contended that the supporting affidavit did not comply with Order 14 rule 2(1).

Held, dismissing the plaintiff's application: (1) the supporting affidavit, being made under affirmation and following paragraph 1 of Form 18 containing the allegation that the defendant is indebted to the plaintiff in the amount claimed and for the matters specified therein, was a sufficient compliance with Order 14 rule 2. It was in effect a verification of the facts on which the claim of the plaintiff was based. The supporting affidavit was not defective;

(2) although the defendant may not have satisfied the court with regard to any specific issue or question in this dispute which should go to trial, it has satisfied the court that for some reason there should be a trial of the claim of the plaintiff;

(3) the court was not satisfied that the defence had been made *mala fide*.

Cases referred to:

(1) *McLardy* v. *Slateum* (1890) 24 Q.B.D. 504 (refd).
(2) *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685 (cited).
(3) *Miles* v. *Bull* [1968] 3 All E.R. 632 (folld).

SUMMONS-IN-CHAMBERS.

M.S. Sandhu for the plaintiff.

C.M. Kanavathi for the defendant.

Cur. Adv. Vult.